

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2015-CP-38-01199
Appellate Case No. 2017-000618

James E. Hensley,Appellant,

v.

Giles Homes, LLC f/k/a Giles Industries of Tazewell, Inc.,.....Respondent,

INITIAL BRIEF OF RESPONDENT

Kimila L. Wooten, S.C. Bar No. 64516
ELMORE GOLDSMITH, P.A.
55 Beattie Place, Suite 1050 (29601)
Post Office Box 1887
Greenville, South Carolina 29602
(864) 255-9500-Telephone
(864) 255-9505-Facsimile
Counsel for Respondent

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STATEMENT OF THE CASE

This lawsuit arises from the Plaintiff's complaints about a new 2007 Giles Industries, Inc. mobile home ("Home") that he purchased in December of 2006. Giles Industries, Inc. ("Giles") was the manufacturer of the home. Plaintiff admits and sets forth the date of purchase in Paragraph 3 of his Complaint as December 1, 2006. The Certificate of Completion of Installation shows that installation of the Home was complete on December 15, 2006. Defendant's Motion for Summary Judgment, Exhibit "A." Plaintiff signed the certificate of completion, thereby acknowledging that the installation was complete. This case was filed on October 13, 2015, and was served upon the Defendant on December 2, 2015.

In his Complaint, the Plaintiff alleged causes of action for negligence, breach of warranties, and unfair trade practices.

On August 2, 2016, Giles filed its Motion for Summary Judgment, based on the expiration of the statute of repose as set forth in S.C. Code § 15-3-640. This statute, in effect since July 1, 2005, provides that "[n]o actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement." Exhibit "A" to Giles' Motion for Summary Judgment (Certificate of Completion of Installation) demonstrated, and Plaintiff agreed, that the installation of the home was completed on December 15, 2006. Accordingly, the statute of repose ran on any claims on December 25, 2014. As Plaintiff also admitted, this case was filed nearly a year after the expiration of the statute of repose.

At the hearing on Giles' Motion for Summary Judgment, held on June 29, 2016, the Plaintiff/Appellant argued for the first time that an exception to the statute of repose would apply in this case, i.e., S.C. Code Section 15-3-670. That section provides an exception to the statute of repose if a party is proved "guilty of . . . gross negligence in providing components, in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement"

The Plaintiff/Appellant presented no evidence in support of its argument against summary judgment. Rather, the Plaintiff/Appellant chose to rely exclusively on its pleadings (which, incidentally, did not even include allegations of gross negligence). The Court, noting that a party may not rely on the allegations of its pleadings in response to a summary judgment motion, held that Giles had presented ample evidence in support of its Motion, and granted summary judgment to Giles. The Plaintiff/Appellant filed a Motion for Reconsideration, which the Court denied after timely response by Giles.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this Court applies the same standard that governs the trial court under Rule 56(c), SCRCP; i.e., summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

ARGUMENTS

I. The Lower Court Did Not Err in Granting Summary Judgment in Favor of Giles on Matters Not Raised in its Motion for Summary Judgment.

The Appellant argues that the trial Court improperly granted summary judgment in favor of Giles “on matters not raised by its Motion for Summary Judgment.” Appellant’s brief, p. 5. On the contrary, the lower Court quite properly granted Giles summary judgment on **exactly** the grounds raised in the Motion. Giles’ Motion, in Paragraph 2, states as follows: “The basis for this motion is that the applicable statute of repose expires prior to the filing and/or serving of the Complaint.” Motion for Summary Judgment, p. 1, Para. 2. The Court’s Order granting summary judgment found the following facts:

1. Plaintiff has admitted that the home in question was substantially complete and installed as of December 15, 2006.
2. Plaintiff filed its suit in this case on October 13, 2015.
3. Plaintiff presented no evidence outside the pleadings in the case in opposition to the Defendant’s Motion.

Order of lower Court, p. 2.

In its Conclusions of Law, the lower Court held as follows:

The Plaintiff has admitted that installation of the home was complete on December 15, 2006. As such, any lawsuit alleging any claims for defects in the home in question would have had to have been initiated by December 15, 2014. Plaintiff filed its suit on October 13, 2015, nearly a year after the expiration of the statute of repose. As such, any and all claims for defects in the home are absolutely barred. All of the Plaintiff’s claims in this case are admittedly based on defects in the home. As such, Giles is entitled to summary judgment on all claims.

Order of lower Court, p. 3-4. Accordingly, the basis for the motion being granted was exactly the basis stated in Giles’ Motion.

The lower Court also addressed the Defendant's claim of an exception to the statute of repose in its Order. The Court stated:

Plaintiff has argued that an exception to the statute of repose exists, i.e., the element of gross negligence. Plaintiff argues that gross negligence presents an issue of fact precluding summary judgment. However, the Plaintiff has neither pled gross negligence nor submitted any summary judgment evidence on the issue of gross negligence. As noted above, the party opposing summary judgment cannot simply rest on mere allegations or denials contained in the pleadings (citations omitted). Instead, a party "must come forward with specific facts showing that there is a genuine issue for trial. The record is devoid of any summary judgment evidence to support the Plaintiff's position. Accordingly, this Court has no choice but to grant [Giles'] Motion.

The Appellant's argument on this issue, while difficult to grasp, apparently is that Giles "never raised any allegations concerning the quality of its construction of the Plaintiff's home nor did it raise the sufficiency of the Plaintiff's pleading as to the question of gross negligence before the hearing." Appellant's Initial Brief, P. 8. Appellant goes on to argue that "[i]n this case Defendant was allowed to raise matters for the very first time at the Summary Judgment hearing and instead of looking at the four corners of the...Motion the trial Court accepted these arguments and then required the Plaintiff to respond to matters not pled by the Defendant's Motion. Appellant's Initial Brief, p. 9.

These arguments demonstrate a fundamental misinterpretation of the burdens required in a summary judgment scenario.

Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Silvester v. Spring Valley Country Club, 543 S.E.2d 563, 566 (S.C. App. 2001). Under Rule 56(c), SCRPC, the party seeking summary judgment has the **initial burden** of demonstrating the absence of a genuine issue of material fact. Baughman v. American Tel. and Tel. Co., 410

S.E.2d 537 (S.C. 1991) (emphasis added). Once the moving party carries its initial burden, the “opposing party must, under Rule 56(e), ‘do more than simply show that there is some metaphysical doubt as to the material facts’ but ‘must come forward with specific facts showing that there is a genuine issue for trial.’” Id. (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)).

In the present case, the Defendant’s Motion was based on the expiration of the statute of repose. As noted above, the Appellant has admitted that the applicable statute of repose for the present case is S.C. Code Ann. § 15-3-640. The appellant has also admitted that installation of the home was complete on December 15, 2006. As such, any lawsuit alleging any claims for defects in the home in question would have had to have been initiated by December 15, 2014. Plaintiff filed its suit on October 13, 2015, nearly a year after the expiration of the statute of repose. This evidence was all that was necessary for Giles to meet its summary judgment burden.

Unlike a statute of limitations, which bars the **remedies** available for certain causes of action, a statute of repose creates a **substantive right** for parties to be free from liability for any and all claims after a legislatively-determined period of time. A statute of repose is an absolute time limit beyond which liability no longer exists and is not tolled for any reason. Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242 (1993); Florence County School District v. Interkal, Inc., 348 S.C. 446, 559 S.E.2d 866 (App. 2002). All of the Plaintiff’s claims in this case are admittedly based on defects in the home. Again, given that the statute of repose is an absolute bar to any claims, Giles’s required argument for summary judgment was simply to prove that the statutory period had expired. With the evidence

attached to Giles's motion, and by admissions of the Plaintiff in its Complaint, Giles's simple burden was met.

Once the initial summary judgment burden is met, the burden to produce summary judgment evidence then shifts to the plaintiff. Singleton v. Sherer, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008). The Plaintiff/Appellant, though previously contending that an outdated version of the statute of repose applied, settled on another defense when it was time for the hearing. At the hearing, the Plaintiff/Appellant argued that an exception to the statute of repose applies in this case, i.e., S.C. Code Section 15-3-670. That statute provides an exception to the statute of repose if a party is proved "guilty of ... gross negligence in providing components, in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement, or to a person who conceals any such cause of action." S.C. Code Section 15-3-370.

To resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues of fact. SCRCP, Rule 56(c); NationsBank v. Scott Farm, 320 S.C. 299, 465 S.E.2d 98 (App. 1995). Under Rule 56, when a party makes a motion for summary judgment and supports it by evidence, the adverse party may not rest on the allegations of his or her pleadings but must respond by affidavit or other evidence demonstrating a genuine issue of material fact. Klippel v. Mid-Carolina Oil, Inc. 303 S.C. 127, 399 S.E.2d 163 (App. 1990). Once the party moving for summary judgment carries its initial burden of showing absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials

contained in pleadings. SCRCF, Rule 56(c); NationsBank v. Scott Farm, *supra*, 320 S.C. 299, 465 S.E.2d 98 (App. 1995). With respect to an issue upon which the non-moving party has the burden of proof, the moving party may discharge the initial burden of demonstrating the absence of a genuine issue of material fact by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case. Lanham v. Blue Cross and Blue Shield of South Carolina, Inc., 349 S.C. 356, 563 S.E.2d 331 (2002).

In the present case, the Plaintiff/Appellant presented no summary judgment evidence of any kind as required to support its defense to the motion, i.e., an exception to the statute of repose. Rule 7, SCRCF, requires that a motion must “state with particularity the grounds thereof.” SCRCF, Rule 7(b). The basis for Giles’s motion was the expiration of the statute of repose, not the “gross negligence” exception to the statute. As such, no notice to the Plaintiff/Appellant was required. Rather, the Plaintiff/Appellant was required to present evidence beyond its pleadings to show that the exception it sought to rely upon applied in this case. The Plaintiff/Appellant produced no evidence. Accordingly, the lower Court properly granted summary judgment under the statute and case law cited above.

II. The Trial Court Did Not Err in Its Interpretation of South Carolina Code.

The Appellant’s second argument is that the lower Court “ruled that [the gross negligence exception to the statute of repose], even when not put in issue by the Movant, requires some *prima facie* showing on the part of the non-moving party to prove negligence or reckless construction.” Appellant’s Initial Brief, p. 11. In support of this circuitous argument, the Appellant states that

“[i]n this case, the only factual issue raised by the Defendant’s summary judgment motion was the applicability of the statute of limitation (sic) found at Section 15-3-640 of the South Carolina Code of Laws. Therefore, the date of purchase and the date the Plaintiff’s home was set up

on his property (sic). The response of Section 15-3-670 should have been the end of the Defendant's summary judgment Motion with the Motion being denied."

Appellant's Initial Brief, p. 12. Again, this argument misconstrues both the statute of repose and the evidence required to avoid summary judgment. As noted in the case law cited above, simply raising a statutory defense in a hearing, or in pleadings, will not be sufficient to withstand a summary judgment motion. Even assuming, as the Appellant alleges, that it had properly pled gross negligence, (Appellant's Initial Brief, p. 13), since absolutely **no evidence** was produced in response to Giles' summary judgment Motion, the Court correctly concluded that it "had no choice" but to grant the Motion. Order on Giles' Motion for Summary Judgment, p. 4.

CONCLUSION

The lower Court properly applied all statutory law regarding the statute of repose in this case. In addition, the Court properly applied Rule 56, SCRPC, and its requirements, in granting summary judgment to Giles. The lower Court's decision should be AFFIRMED.

July 21, 2017



Kimila L. Wooten, S.C. Bar No. 64516
ELMORE GOLDSMITH, PA
55 Beattie Place, Suite 1050 (29601)
Post Office Box 1887
Greenville, South Carolina 29602
(864) 255-9500-Phone
(864) 255-9505-Facsimile
Counsel for Appellant

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James E. Hensley,Appellant,

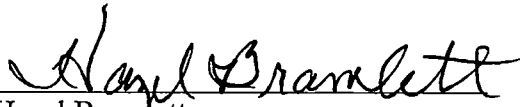
v.

Giles Homes, LLC f/k/a Giles Industries of Tazewell, Inc.,.....Respondent,

PROOF OF SERVICE

I certify that on July 21, 2017 I have served the Initial Brief of Respondent on James E. Hensley by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record, as follows:

Lawrence Keitt, Esquire
Law Office of Lawrence Keitt
Post Office Box 811
340 Summers Avenue
Orangeburg, South Carolina 29116


Hazel Bramlett
Legal Assistant to Kimila L. Wooten

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Via U.S. Mail

The Honorable Jenny Abbot Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

Re: *James E. Hensley v. Giles Homes, LLC f/k/a Giles Industries of Tazewell, Inc.*
Appellate Case No. 2017-000618

Dear Ms. Kitchings:

Enclosed to be filed are the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal in the above referenced matter. Also enclosed are copies of these documents and a return envelope so that a filed copy of the document can be returned to our office.

By copy of this letter, I am serving Appellant's counsel with these documents.

If you have any questions, please do not hesitate to contact us.

Sincerely yours,

ELMORE GOLDSMITH, P.A.



Hazel Bramlett
Legal Assistant to Kimila L. Wooten

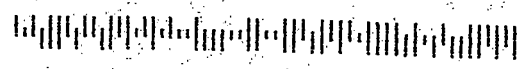
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ELMORE GOLDSMITH, P.A.



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TO:

The Honorable Jenny Abbot Kitchings
 South Carolina Court of Appeals
 1015 Sumter Street
 Columbia, South Carolina 29211

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